

ANALYSIS OF AMENDED BILL

Franchise Tax Board

Author: Speier Analyst: LuAnna Hass Bill Number: SB 413
Related Bills: See Legislative History Telephone: 845-7478 Amended Date: March 26, 2001
Attorney: Patrick Kusiak Sponsor: _____

SUBJECT: California Whistleblower Protection Act/State Agencies Print, Post & Email Notice
Explaining the Act

SUMMARY

This bill would make various changes to the laws regarding the California Whistleblower Protection Act (CWPA), including requiring state agencies to distribute a notice explaining the CWPA to all employees.

SUMMARY OF AMENDMENTS

The March 26, 2001, amendments made various changes relating to state agencies and the CWPA, as discussed below in the "This Bill" portion of the analysis.

This is the department's first analysis of this bill.

PURPOSE OF THE BILL

The author's office has indicated that the purpose of this bill is to encourage state employees to report improper activity by notifying them of their rights under the CWPA.

EFFECTIVE/OPERATIVE DATE

This bill would be effective and operative January 1, 2002.

POSITION

Pending.

ANALYSIS

FEDERAL/STATE LAW

Whistleblowing is generally defined as disclosing information that is reasonably believed to be evidence of a violation of any law, rule, or regulation. Violations also may include mismanagement of funds, an abuse of authority, or a specific and substantial danger to public health or safety.

Board Position:

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Department Director

Date

Alan Hunter for GHG

06/19/01

The federal Whistleblower Protection Act of 1989 strengthened protections for federal employees, former employees, and applicants for employment that claim they have been subject to personnel actions because of whistleblowing activities. In 1994, the act was further expanded to cover additional types of personnel actions and extend whistleblower protection to employees of government corporations and employees in the Veterans Health Administration.

State law allows state employees protection from reprisal, retaliation, threats, coercion, or similar improper acts under the CWPA. For purposes of the CWPA:

- Employee is defined as any individual appointed by the Governor or employed or holding office in a state agency.
- State agency is defined as every state office, officer, department, division, bureau, board, and commission including the University of California and California State University.
- Improper governmental activity is any activity by a state agency or employee during the employee's official duties that is in violation of any state or federal law.

A state employee may not directly or indirectly use their official authority or influence to intimidate, threaten, coerce, command, or attempt to intimidate, threaten, coerce, or command any person for the purpose of interfering with the rights of state employees under the CWPA.

The State Auditor is responsible for administering the CWPA and must investigate and report on all improper governmental activities. The identity of the person providing the information that prompts the State Auditor to investigate must remain confidential unless the person gives written permission, or the disclosure is requested by a law enforcement agency for purposes of a criminal investigation.

Any person that intentionally takes part in an act of reprisal, retaliation, threat, or coercion against a state employee for having made a protected disclosure is subject to a fine of up to \$10,000 and imprisonment of up to one year. A state civil service employee that takes part in the conduct must be disciplined by adverse action by either their appointing power or the State Personnel Board (SPB).

Under state law, an adverse action may be taken against any state employee for any cause for discipline. A cause for discipline encompasses many actions, including unlawful retaliation against any other state officer or employee who reports any facts or information of a suspected violation of any law. Adverse action is defined as dismissal, demotion, suspension, or other disciplinary action.

A person shall not be retaliated against under the State Civil Service Act because they showed opposition to any practice made an unlawful employment practice, or made a charge, testified, assisted, or participated in an investigation, proceeding, or hearing under the act.

Existing state law prohibits the disclosure of any taxpayer information, except as specifically authorized by statute. Any FTB employee or member responsible for the unauthorized disclosure of state or federal tax information is subject to criminal prosecution. Improper disclosure of state tax information is a misdemeanor and improper disclosure of federal tax information is a felony.

THIS BILL

This bill would require the State Auditor to prepare a written explanation of the CWSA for state employees by April 1, 2002. This explanation must include, but is not limited to, the following:

- Instructions on how to contact the State Auditor by mail or telephone,
- A general overview of government activities that are considered to be improper and examples of three of the most common types that may be reported to the State Auditor,
- Examples of two of the most commonly reported governmental activities that the State Auditor does not have the authority to investigate,
- An explanation of the whistleblower protection that is available to state employees who report improper governmental activities to the State Auditor,
- The requirement that the State Auditor must protect the anonymity of the employee that reports the improper activity, and
- The State Auditor's authority in relation to violations of law that are discovered during an investigation of improper activities.

This bill would require the State Auditor to post the above information on the website of the Bureau of State Audits and prepare a notice that consists of the above information to be distributed in an electronic format. By July 1, 2002, each state agency must print and post the notice, without editing the content, at its state offices in a location where employees would be expected to see it weekly. State agencies also would be required to send the information contained in the above notice to its employees via electronic mail on July 1, 2002, and every six months thereafter.

The intentional failure of a state agency to comply with the above requirements would constitute an improper governmental activity for purposes of the CWSA.

This bill would define "state agency" as every state office, officer, department, division, bureau, board, and commission, including California State University and the University of California.

If the State Auditor finds that an employee may have participated or engaged in improper governmental activities, this bill would require the State Auditor to report the findings of its investigation to the employee's appointing power. The appointing power would either serve notice of an adverse action or give a written explanation for not taking adverse action. A copy of the adverse action or written reasons for not taking adverse action would then be filed with SPB and the State Auditor. If adverse action is not taken, the State Auditor and SPB may file charges against an employee requesting that adverse action be taken.

This bill would add "employee" to existing law that requires the appropriate supervisor, manager, or appointing authority to receive a copy of the SPB hearing or investigation findings. The term "employee" also would be added to existing law that allows supervisors, managers, or appointing powers that retaliate against the complainant for participating in whistleblower activities to request a hearing before SPB.

This bill would add compensatory damages to the list of relief that may be received by the state employee from the SPB if a violation of the CWSA occurs.

This bill would clarify that if a manager, supervisor, or employee violates the CWSA and the violation constitutes legal cause for discipline, SPB must impose a just and proper penalty for that violation.

This bill would remove the requirement that any state employee filing a complaint of retaliation must have previously filed the complaint with the State Auditor or Inspector General.

This bill would require SPB to assist the State Auditor in preparing the written explanation of the CWSA for state employees. SPB must provide a written explanation of their role in investigating claims that a state employee has been subject to retaliation as a result of reporting improper governmental activities.

Once a person successfully demonstrates that protected activity was a contributing factor in any adverse employment action, this bill would place the burden of proof on a supervisor, manager, employee, or appointing power to prove by clear and convincing evidence that an alleged adverse employment action would have occurred even if the person had not engaged in protected activities. If the supervisor, manager, employee, or appointing power fails to meet their burden of proof, the person will have a complete affirmative defense to the adverse employment action. As defined in this bill, "adverse employment action" would include various personnel actions such as suspension, disciplinary actions, or transfer.

IMPLEMENTATION CONSIDERATIONS

In this bill, the State Auditor would send a copy of an investigative report to the employee's appointing power if the State Auditor finds that the employee "may have" participated in improper governmental activities. The appointing power would either take adverse action with the employee or give a written explanation of its reasons for not taking adverse action. The phrase "may have" would leave the findings of the investigation open to debate as it suggests the findings were not conclusive, yet allows the appointing power to take adverse action. Furthermore, existing law under the CWSA outlines guidelines for the State Auditor to follow regarding the investigations of employees that have participated or engaged in improper activities. The guidelines include reporting requirements for the State Auditor and the appointing power. The added guidelines in this bill would create two different provisions in the law regarding guidelines for the State Auditor. The author may wish to amend the bill to remove the phrase "may have," which would permit adverse action only when the findings were conclusive or consolidate the two provisions.

This bill would define "state agency" within the CWSA. Existing law of the CWSA specifically defines "state agency" with a reference to the Government Code. Multiple definitions for the same term could lead to confusion and complicate implementation and administration of this bill. The author may wish to remove one definition or consolidate the definitions.

This bill would require state agencies to notify employees of the CWPA by e-mail every six months. The department does not currently provide an e-mail address and access to a computer to all employees. It would be helpful if the bill could be amended to allow state agencies more latitude on how employees are informed, so that the department could continue with the current practice of requiring supervisors to print notices for employees without access to e-mail.

If this bill were amended to resolve these implementation considerations, implementing this bill would not significantly impact the department.

TECHNICAL CONSIDERATIONS

This bill would require the employee's appointing power to either serve notice of an adverse action or give a written explanation for not taking adverse action within **60 days** of receiving the State Auditor's investigative report. Existing law requires SPB to complete findings of a hearing or investigation into a complaint of reprisal or retaliation within **60 working days** and provide a copy to the employee and appropriate supervisor. For consistency, the author may wish to amend the bill to allow the employee's appointing power 60 working days to take action as opposed to just 60 days.

OTHER STATES

A review of *Florida*, *New York*, *Illinois*, *Michigan*, *Minnesota* and *Massachusetts* tax laws found *Michigan*, *Minnesota*, and *New York* provide whistleblower protections for private and public employees. *Illinois* and *Florida* protect only state and local government employees. It could not be determined if the issue of state agencies notifying employees of their rights occurs in these states.

FISCAL IMPACT

Once the implementation concerns are resolved, this bill would not significantly impact the department's costs.

ECONOMIC IMPACT

This bill would not impact the state's income tax revenue.

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